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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. VIRGINIA FRAZIER, Defendant and Appellant.	B208449 (Los Angeles County Super. Ct. No. BA331474)

APPEAL from a judgment of the Los Angeles Superior Court, Judith Champagne, Judge. Affirmed.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Virginia Frazier of assault with a deadly weapon and found she had personally inflicted great bodily injury under circumstances involving domestic violence. On appeal Frazier contends the evidence was insufficient to support the jury's findings of great bodily injury and domestic violence. She also asserts the trial court erred in replacing two members of the jury panel with alternate jurors and in sentencing her to an aggregate state prison term of 23 years. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Frazier was charged in an information with one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).[1] The information specially alleged Frazier had personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). It further alleged Frazier had suffered three prior serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and three prior serious felony convictions within the meaning of section 667, subdivision (a)(1).

2. *The Trial*

Frazier pleaded not guilty and denied the special allegations. According to the evidence at trial,[2] on November 4, 2007 Frazier and her boyfriend, Alan Guthrie, were socializing at Guthrie's apartment with Guthrie's friend, Eric Williams. All three were drinking alcohol. Frazier and Guthrie argued for 10 to 15 minutes. When Frazier refused Guthrie's pleas for her to "calm down," Guthrie asked her to leave. Instead, Frazier came toward Guthrie with a steak knife in her hand and attempted to stab him. Guthrie raised his arm in a defensive position to protect his face and upper chest from Frazier's attack, and the knife blade slashed the back of his arm, causing a three inch gash. Guthrie immediately sought medical assistance at the fire station across the street from his

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1 Statutory references are to the Penal Code unless otherwise indicated.

2 Trial of the substantive offense and related enhancements was bifurcated from the trial of the specially pleaded prior conviction allegations.

residence. Fire department personnel bandaged the wound but urged him to go to the hospital for stitches. He did not. The wound eventually healed but left a three-inch scar, which Guthrie showed the jury.

When the police arrived, Guthrie's wound was still bleeding profusely. Frazier told police Guthrie had been stabbed in a fight with a Hispanic man on the bus. Guthrie and Williams told police Frazier had stabbed Guthrie.

Herman Wright, a former boyfriend of Frazier's, testified about a prior incident involving Frazier. According to Wright, while he was sitting in his car, Frazier approached unexpectedly and entered the car. She asked him to drive her somewhere and to give her money. When he refused, she became angry and pulled out a pocket knife, stabbing Wright in the arm and shoulder.

Frazier testified on her own behalf. According to Frazier, Guthrie had asked her to lend him money. When she refused, Guthrie became angry; and Frazier decided to leave. Guthrie tried to prevent Frazier from leaving, putting her in a "choke hold." Frazier grabbed a knife in self-defense and cut Guthrie on the arm to make him release her. When he finally did, she ran out of the apartment and called the police.

3. *The Dismissal of Two Jurors and Replacement with Alternates*

After two and one-half days of deliberations, the foreperson informed the court the jury was deadlocked nine to three and at least two jurors had communicated they would suffer financial hardship if they were required to continue deliberating. Defense counsel asked the court to inquire whether the jury was hopelessly deadlocked and, if so, to declare a mistrial. The prosecutor also asked the court to inquire whether the issue was one of hardship or whether the jury was hopelessly deadlocked. After the lunch break, the court asked the jury foreperson if the court and counsel could be of any assistance in resolving questions or addressing requests for clarification. The foreperson informed the court that the jury's 15-minute discussion during the lunch break had "prove[d] very productive" and requested to continue deliberations.

At 3:24 p.m. the same day (a Friday), the foreperson notified the court the jury was deadlocked 10 to two, and several jurors had indicated it would pose a serious

financial hardship to deliberate into the next week. The court polled the jurors to determine whether their continued service would create a financial hardship. Two of the jurors said they would suffer severe financial hardship if they were required to continue deliberations into the next week. After questioning each juror about financial hardship, the court asked defense counsel and the People whether they thought it would be best to excuse the two jurors who claimed hardship and replace them with alternates. The prosecutor and defense counsel expressly agreed to replace the two jurors with alternates. Accordingly, jurors number 10 and 11 were replaced and deliberations resumed.

4. *The Verdict and Sentence*

The jury convicted Frazier of assault with a deadly weapon and found true the allegations she had inflicted great bodily injury under circumstances involving domestic violence. Frazier waived her right to a trial on the prior conviction allegations and admitted she had suffered the convictions. The trial court struck two of the prior qualifying strike convictions in the interests of justice for purposes of sentencing under the Three Strikes law but expressly declined to strike the third. The court sentenced Frazier to an aggregate state prison term of 23 years (the upper term of four years for the assault, doubled under the Three Strikes law, plus five years for the great bodily injury/domestic violence enhancement and five years for each of the two prior serious felony enhancements (§ 667, subd. (a)(1)).[3]

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3 Although the information alleged three prior serious felony convictions within the meaning of section 667, subdivision (a)(1), two of those convictions, occurring in Utah in 1972, involved charges brought and tried together. (See § 667, subd. (a)(1) [five-year enhancement under § 667, subd. (a) only applicable to each "prior conviction on charges brought and tried separately"]; see generally *People v. Wiley* (1995) 9 Cal.4th 580, 590.)

DISCUSSION

1. *The Jury's Finding on the Specially Alleged Section 12022.7 Enhancement Is Supported by Substantial Evidence*

Frazier contends the evidence is insufficient[4] to support the jury's finding she inflicted great bodily injury on Guthrie under circumstances involving domestic violence. (See § 12022.7, subd. (e) ["[a]ny person who personally inflicts great bodily injury [as defined in subdivision (f)] under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years"].)

Section 12022.7, subdivision (f), defines great bodily injury as a "significant or substantial physical injury." Although minor or moderate harm is insufficient to constitute great bodily injury (see CALCRIM No. 3163), "the injury need not be so grave as to cause the victim '"permanent," "prolonged" or "protracted"' bodily damage." (*People v. Cross* (2008) 45 Cal.4th 58, 64, quoting *People v. Escobar* (1992) 3 Cal.4th 740, 750.) Rather, all that is required to find great bodily injury is "'a substantial injury *beyond* that inherent in the offense'" itself. (*Cross*, at p. 64; *Escobar*, at p. 746.) The

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4 In reviewing a claim of insufficient evidence in a criminal case, we determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *People v. Holt* (1997) 15 Cal.4th 619, 667.) "In making this assessment the court looks to the whole record, not just the evidence favorable to the [defendant] to determine if the evidence supporting the verdict is substantial in light of other facts." (*Holt*, at p. 667.) Substantial evidence in this context means evidence that is reasonable, credible and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 ["'"[w]hen the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt"'"].) Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his or her guilt beyond a reasonable doubt. (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

inquiry is inherently a factual one, dependent on the facts presented at trial in the context of a particular crime and the injuries suffered by the victim. (*Cross,* at p. 64.) """A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description."" (*Ibid.*) """If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding."" (*Escobar,* at p. 750.)

According to the evidence at trial, Frazier used a steak knife to slash the back of Guthrie's arm, which he had raised to protect himself as Frazier attacked him. The injury, which the jury found neither minor nor trivial, caused extensive bleeding, required Guthrie to seek immediate medical attention at a local fire station and left a significant scar. Although Guthrie did not go to the hospital for stitches, he was advised to do so by the fire department employee who administered first aid. The jury was shown photographs of the stab wound taken the night of the injury, as well as Guthrie's scar. Whether or not the evidence was also susceptible to a contrary finding, on this record we must conclude the jury's finding of great bodily injury is supported by substantial evidence. (See, e.g., *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042 ["[a]brasions, lacerations, and bruising can constitute great bodily injury"]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 733 [multiple abrasions, lacerations and bruising constituted great bodily injury].)

Frazier's alternative contention—there is insufficient evidence to support the finding the assault was committed under circumstances involving domestic violence—fares no better. Section 12022.7 ascribes the same meaning to "domestic violence" as found in section 13700, subdivision (b). (See § 12022.7, subd. (e) ["[a]s used in this subdivision, 'domestic violence' has the meaning provided in subidivision (b) of Section 13700"].) Section 13700, subdivision (b), defines "domestic violence" to include abuse committed against the "person with whom the suspect . . . is having or has had a dating or engagement relationship."

"The term dating relationship means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations." (CALCRIM No. 3613; see also § 243, subd. (f)(10) [same definition of dating relationship in statute providing penalty for battery inflicted in course of domestic violence]; Fam. Code, § 6210 [same definition of dating relationship in Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.)].) A "dating relationship" does not mean a "'serious courtship,' an 'increasingly exclusive interest,' 'shared expectation of growth'" or a lengthy or enduring relationship. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1116.) It does, however, denote more than "'a casual relationship or an ordinary fraternization between [two] individuals in a business or social context.'" (*Id.* at p. 1117; accord, *People v. Upsher* (2007) 155 Cal.App.4th 1311, 1323.)

Contrary to Frazier's contention, there was substantial evidence to support the jury's finding she and Guthrie were involved in a "dating relationship" at the time the assault occurred. Guthrie testified he and Frazier had been "seeing each other" "off and on" for several months and, at the time of the attack, were boyfriend and girlfriend. Williams also testified Frazier was Guthrie's girlfriend, explaining he did not intervene in the altercation between Frazier and Guthrie because Frazier was "not his lady." Frazier may have testified differently, but the jury apparently rejected that testimony. Such credibility determinations are well within the province of the jury and are sufficient to support its finding of a dating relationship between Frazier and Guthrie. (*People v. Rucker, supra,* 126 Cal.App.4th at pp. 1116-1117.)

2. *Frazier's Contention the Court Erred in Seating Two Alternate Jurors Is Not Cognizable in This Appeal*

Frazier contends the court erred in replacing the two jurors with alternates. However, defense counsel expressly agreed to replace the jurors. Whether that agreement constitutes invited error or simply forfeiture, the result is the same: The issue is not cognizable on appeal. (See *People v. Seaton* (2001) 26 Cal.4th 598, 638-639 [due to defense counsel's stipulation to excuse juror, any error was invited]; *People v. Mickey*

(1991) 54 Cal.3d 612, 664 [failure to object at trial to discharge of juror results in forfeiture of issue on appeal].)

In an attempt to salvage her claim of error, Frazier contends her counsel was constitutionally ineffective in agreeing to excuse the two jurors. A defendant claiming ineffective assistance of counsel in violation of his or her Sixth Amendment right to counsel must show not only his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, but also it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action "'might be considered sound trial strategy'" under the circumstances. (*Strickland*, at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 ["[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 ["'[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" [citation], the contention [that counsel provided ineffective assistance] must be rejected'"].)

The record is silent as to defense counsel's reasons for agreeing to excuse the two jurors who claimed financial hardship. However, it is certainly conceivable defense counsel agreed to replace the jurors to eliminate any inclination they may have had to vote with the majority simply to achieve a quick resolution and thus avoid the financial

hardship they claimed would have been caused by continued deliberations. (See *People v. Earp* (1999) 20 Cal.4th 826, 893 ["[a]s we observed in *People v. Lucas* [(1995)] 12 Cal.4th 415, 489, a juror facing personal hardship might feel 'some pressure to bring the penalty deliberations to a speedy close'"].) At the very least, with a silent record we cannot say this plausible, tactical decision amounted to ineffective assistance of counsel. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [because record is often silent as to counsel's reasons for failing to object and there could be a plethora of possible tactical reasons, ineffective assistance of counsel claims are generally more appropriately litigated in habeas corpus proceeding where matters outside four corners of the record may be considered]; see *id.* at p. 267 ["appellate court should not . . . brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed"].)

3. *The Trial Court Did Not Abuse Its Discretion in Refusing To Dismiss a Prior Conviction under Section 1385*

At sentencing the trial court carefully considered Frazier's request to strike some or all of the specially alleged prior convictions pursuant to section 1385. The court concluded it was appropriate to strike two of the prior convictions for purposes of the Three Strikes law (one for manslaughter and one for attempted manslaughter) because they were remote in time, having occurred in Utah in the early 1970's when Frazier was 21 years old. The court denied Frazier's request to dismiss the most recent prior conviction (in 1995) for assault with a deadly weapon.

Frazier contends the court erred in refusing to dismiss the 1995 conviction for purposes of the Three Strikes law. Section 1385, subdivision (a), vests the court with discretion to dismiss a prior conviction, including a qualifying strike conviction, "in furtherance of justice." (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530; *People v. Williams* (1998) 17 Cal.4th 148, 158.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent

felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.)

We review the trial court's refusal or failure to dismiss a prior strike allegation under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] . . . [¶] . . . '[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] . . . Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Id.* at p. 378.)

The trial court carefully considered Frazier's request to strike the prior convictions pursuant to section 1385 and acted well within its discretion in declining to dismiss the 1995 prior qualifying strike conviction. The court explained: "The court recalls the evidence presented at the trial, including the testimony of Herman Wright and the testimony of the defendant, and I note that in the defendant's sentencing memorandum, which includes her statements to Dr. Simpson, the forensic psychiatrist and the testimony she gave in this trial, she characterizes herself as the victim in each and every criminal act dating back to 1971.[5] Now, I am confident there are many factors in her background

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5 Frazier committed the prior offenses in Utah in 1971. She was convicted of them in 1972.

that have created challenges for her.[6] However, she appears to totally minimize the role that she has played in these various criminal acts. I am concerned about the lack of impulse control and her tendency to resort to violence, not when she is presented with danger, but when her wishes are frustrated. I do find that she potentially poses a danger to people. On the other hand, the Utah cases appear to have arisen out of the same event. They were not charges brought separately and tried separately and sentenced separately. It looks like it is all part of one transaction. Additionally, it's been 37 years since that event. The court finds that the interest of justice can be appropriately served if the Utah cases are stricken by the court for purpose of sentencing under 1170.12 [the Three Strikes law] but not 667(a) of the Penal Code, so that I have more flexibility in terms of imposing a sentence long enough to protect society from the danger that Ms. Frazier presents."

As the record reflects, in refusing to dismiss the prior, similar assault conviction from 1995, the court concluded there was nothing in the nature of that prior crime or in the present offense that suggested Frazier fell outside the spirit of the Three Strikes law. The court also noted Frazier had not been free from criminal activity since her 1995 conviction, having been convicted of felony possession of a controlled substance in 1997. The court's thoughtful exercise of its discretion under section 1385 is not reversible error.

4. *Frazier's 23-year Sentence Does Not Violate the Federal or State Constitutions' Prohibitions Against Cruel and/or Unusual Punishment*

Frazier contends her sentence of 23 years in prison, which she characterizes as effectively a "life sentence" for a woman who was 58 years old at the time of sentencing, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and cruel or unusual punishment in violation of the California Constitution. Frazier has forfeited these arguments by failing to raise them in the trial

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6 Together with her sentencing memorandum, Frazier submitted a psychiatric evaluation prepared by Dr. Joseph Simpson, a forensic psychiatrist, who detailed the long history of physical and sexual abuse Frazier had suffered at the hands of her father and mother, resulting in her giving birth to two of her father's children.

court. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) In addition, they fail on their merits.

Federal courts have consistently rejected claims that life sentences (or, in this case, the possible functional equivalent) imposed on recidivists like Frazier violate the ban on cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution. (*Ewing v. California* (2003) 538 U.S. 11, 29 [123 S.Ct. 1179, 1189-1190, 155 L.Ed.2d 108] ["In weighing the gravity of [defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions."]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [123 S.Ct. 1166, 1174, 155 L.Ed.2d 144]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965 [111 S.Ct. 2680, 115 L.Ed.2d 836]; *Rummel v. Estelle* (1980) 445 U.S. 263, 284 [100 S.Ct. 1133, 63 L.Ed.2d 382].) Neither Frazier's prior criminal history (including a 1995 conviction for assault with a deadly weapon, as well as older convictions for manslaughter and attempted manslaughter) nor the nature of her current offense warrants a different conclusion in this case.

California appellate courts likewise have consistently rejected claims that sentences imposed under recidivist statutes violate the prohibition against cruel or unusual punishment contained in the California Constitution. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 820, 826-827; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) Under state law Frazier must overcome a "considerable burden" in challenging her penalty as cruel or unusual (*People v. Wingo* (1975) 14 Cal.3d 169, 174), demonstrating that the punishment is so disproportionate to the crime for which it was imposed it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In assessing these claims the *Lynch* Court identified three factors for reviewing courts to consider: (1) the nature of the offense and the offender; (2) how the punishment compares with punishments for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Id*. at pp. 425-427.)

The first prong of the *Lynch* test does not support a finding of disproportionality. The qualifying strike conviction used to enhance her sentence under the Three Strikes law was assault with a deadly weapon, the exact offense for which she was convicted in this case. The other prior convictions for manslaughter and attempted manslaughter, which were used to enhance her sentence under section 667, subdivision (a), were also crimes of violence. As the trial court observed, Frazier has a pattern of attempting to resolve disputes with violence. When the nature of the offense and the offender are considered, Frazier's sentence is neither shocking nor inhumane. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 479, 482-488 [determinations whether a punishment is cruel or unusual may be based solely on the nature of the offense and the offender]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Frazier fails to offer any argument as to the second or third *Lynch* factors other than to note her sentence of 23 years is the functional equivalent of a life sentence for a 58-year-old woman. As we have explained, Frazier is being punished for both her current offense and her prior criminal behavior under a California statutory scheme that expressly mandates more severe punishment for habitual criminals. Statutory schemes providing for increased punishment for recidivists have long withstood challenges on the ground they constitute cruel or unusual punishment. (*People v. Cooper, supra,* 43 Cal.App.4th at pp. 826-827; *People v. Kinsey, supra,* 40 Cal.App.4th at pp. 1630-1631.) This case is not the "exquisite rarity" where the sentence is so harsh as to shock the conscience or offend fundamental notions of human dignity. (See *Kinsey,* at p. 1631.) Accordingly, there is no basis to find the sentence unconstitutional under either the United States or California Constitution. (*Lockyer v. Andrade, supra,* 538 U.S. at p. 77; *Cooper,* at pp. 826-827.)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.